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No. 83-8

# In the Supreme Court of the United States

OCTOBER TERM, 1982

**ROBERT E. LEE,**

*Petitioner,*

vs.

**NATIONAL CAN CORPORATION,**

*Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals erred in reversing as "clearly erroneous" the district court's finding that respondent had discriminated against petitioner because of his race.

National Can Corporation has no parent companies and no affiliates. Its subsidiaries (except wholly owned subsidiaries) are:

Metal Containers Ltd. of Cyprus
National Can Iberica S.A. (Spain)
National Can Italiana, S.p.A. (Italy)

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 699 F.2d 932. The oral opinion of the district court (Pet. App. 12a-28a) is unreported.

### STATEMENT OF THE CASE

After an exhaustive review of the trial record, the court of appeals concluded that petitioner Robert E. Lee "was not a victim of employment discrimination" at National

Can (Pet. App. 10a) and therefore set aside as "clearly erroneous" the district court's findings to the contrary. (Pet. App. 7a, 9a, 10a.) Petitioner seeks review of that determination.

**The Events of May 10, 1977**

On May 10, 1977, petitioner arrived at respondent's plant around 9:30 or 9:45 a.m. (Tr. 52, 165.) When he arrived, he filled out respondent's standard employment application. (Tr. 53, 166; D.Ex. 2.) Although petitioner knew that corporations checked the information on applications for accuracy (Tr. 157),[1] much of the information he filled in was false. Petitioner listed as his most recent employer Piasecki Helicopter in Philadelphia, "From *10-69* to *9-76*." In fact, petitioner had worked for Piasecki for about five months in 1954; during the seven years he said he was at Piasecki, petitioner had worked in at least twelve different jobs, and had been fired from at least seven of them. (Tr. 130-44, 154-57; D.Ex. 18.) His application made no reference to these jobs. (D.Ex. 2.) He also stated that he was married to "Juanita Lee," when in fact he was divorced. (Tr. 153.) He further stated that he had never served in the U.S. Armed Forces; at trial, however, he testified that he served in the army. (Tr. 90-91.) After writing all of this false information, Lee signed the application under the following certification (Pet. App. 2a-3a):

> I hereby certify that the information given by me in this form is true and correct and I agree that if I am employed, and it is found at any time that such information is false, I will be subject to dismissal without notice.

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[1] Indeed, less than a month before May 10, petitioner had been fired from a job in part for falsifying his application there. (Tr. 133.)

Petitioner then was interviewed by the plant personnel manager, Michael Glynn. The purpose of this interview was to screen out applicants with prolonged periods of unemployment or a history of short term employment. (Pet. App. 3a; Tr. 55-56, 227, 232-33.) Glynn noted that petitioner's application showed a 9 month period of unemployment prior to the application. This was unusual; the job opportunities for machinists were excellent at the time, and a qualified machinist should not have had an unexplained lengthy period of unemployment. (Tr. 167, 232-33, 262.) Nevertheless, Glynn decided to allow petitioner to continue with the application process. (Pet. App. 3a; Tr. 167-68, 233.)

The next step in the hiring process for petitioner was to be the technical interview, which the machine shop supervisor, Joe Turczak, was to conduct. (Pet. App. 3a; Tr. 168.) Turczak, however, was in a production meeting, and was unavailable to conduct the interview. Glynn informed petitioner that he did not know how long Turczak would be in the meeting, and offered petitioner the choice of waiting for Turczak or rescheduling the technical interview. Petitioner chose to wait. (Pet. App. 3a; Tr. 168-69, 233-34.)

Petitioner testified at trial that while waiting in the lobby he saw the machine shop supervisor take at least two or three white applicants in for technical interviews. (Tr. 58-59, 123; D.Ex. 4.) Petitioner described this "supervisor" as being about five feet eight inches tall and having dark hair mixed with gray. In fact, Turczak, the only machine shop supervisor at that plant, stands six feet two inches tall and has blond or light brown hair. (Pet. App. 3a & n.2; Tr. 124-26, 259.)

At about 11 or 11:15 that morning, the receptionist reminded Glynn that petitioner was still waiting to see Tur-

czak. Because Glynn felt petitioner had waited too long without a response, he called petitioner back into his office and again offered petitioner the alternatives of waiting or rescheduling. This time petitioner decided to reschedule the technical interview, and left with the understanding that Glynn would call him with a new appointment to see Turczak. (Tr. 234, 239.) Although at trial petitioner claimed that Glynn did not speak to him a second time that morning, that testimony is contradicted by petitioner's own sworn statement in his verified amended complaint that he "was twice interviewed by the Personnel Manager" on May 10. (R. 49 ¶¶ 5, 9b, D.Ex. 35B.)

Six other people applied for the machinist position at EMD on May 10, all of whom were white. One, Larry Wickstrom, arrived at approximately 8:30 and was able to see Turczak before Turczak went into the production meeting around 9:00. (Tr. 230, 263-64.) After Glynn conducted the five year reference check mandated by respondent's Industrial Relations Standard Practice Manual, Wickstrom was hired. (Tr. 39-46, 228, 231; D.Ex. 29.) Turczak was in this production meeting until the lunch hour, and never left such meetings to interview applicants. Consequently, Turczak saw no more applicants that morning. (Tr. 264, 268.) Another applicant, James O'Connor arrived at the EMD after Lee, was interviewed by Glynn and then offered the same alternative of waiting or rescheduling. O'Connor informed Glynn that he was not working that day and would return after lunch. Glynn warned him that Turczak still might be unavailable, but O'Conner indicated a willingness to try. (Tr. 234-35, 255.) O'Connor returned after 1:00, and Turczak, whose meeting had ended around noon, interviewed him. (Tr. 181, 264-65.) After his references were checked, O'Connor was hired. (Tr. 235; D.Ex. 29.) None of the other four ap-

plicants, whom Turczak did not remember seeing, was hired. (Tr. 31, 236-37, 264-65; P.Ex. 4.)[2]

Glynn did not decide whether to hire Lee that day; his application was considered "pending." (Pet. App. 3a; Tr. 236.) Petitioner admitted at trial that Glynn did not tell him on May 10, 1977 that he could not have a job with respondent. (Pet. App. 3a; Tr. 129-30.)

**The Events Occurring Between May 10 and June 7, 1977**

The next day, May 11, 1977, Lee filed an EEOC charge against respondent. (Pet. App. 3a; D.Ex. 4; Tr. 128.) In this charge he claimed that the "shop foreman" interviewed white applicants while he waited for 4 hours without being interviewed. Lee then stated, "I left, and returned the next day. I was told that the party was on the phone. After 2 hours I was told he was not in but would call me which he never did." The "next day" was May 11, the very same day he signed the EEOC charge under oath. Lee signed this false EEOC charge again on November 23, 1977, this time under the caption: "I declare under penalty of perjury that the foregoing is true and correct." (D.Ex. 4.)[3] At trial, Lee admitted that he had not returned on May 11, as he had alleged. (Pet. App. 4a n.3; Tr. 129.)

On May 13, petitioner telephoned Glynn. (Tr. 239.) Glynn informed petitioner that he had been trying to reach

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[2] In addition, two persons applied at respondent's plant for positions other than machinist that day. (Tr. 31; P.Ex. 4.) One of them, Ron Nocentelli, was black. Because there were no openings available for Nocentelli that day, Glynn placed his application in respondent's affirmative action retrieval file, and subsequently hired him. (Tr. 236-38.)

[3] The EEOC conducted an investigation of Lee's refusal-to-hire allegation and concluded "that there is not reasonable cause to believe that allegation to be true." (Pet. App. 4a.)

him, and scheduled an interview for petitioner with Turczak on May 16. (Tr. 239-40.) Petitioner did not show up for this interview. (Tr. 240.) Thereafter Glynn made no further attempt to contact petitioner because he felt that petitioner had lost interest in the job. (Tr. 245-46.) Nevertheless, Glynn made no final decision concerning his application, and if petitioner simply had returned to the plant, Glynn would have allowed him to continue the application process. (Tr. 240.)

In fact, Lee started a new job with Bell & Howell on May 15, 1977, two days after his telephone conversation with Glynn and one day before his scheduled interview with Turczak. He worked at Bell & Howell for six weeks, until he was fired in early July. (D.Ex. 34; D.Ex. 18, ¶ 13.)

**The Events of June 7, 1977**

On June 7, 1977, petitioner returned to respondent's plant and filled out an application under the name of "Edward Lee," using a second social security number he had maintained for thirty years under that name. (Pet. App. 4a; Tr. 346; D.Ex. 35A.) This application also is riddled with false information. Petitioner again stated that he was married, though this time to "Renee Esther Lee" rather than Juanita. He again denied having served in the military. He did not list Bell & Howell as his present employer and did not mention Piasecki or any of the numerous jobs he actually had held and lost; rather, he stated that his last employer was the Army Tank Arsenal in Centerline, Michigan, where he claimed to have worked "From *3-58* to *4-77*." (D.Ex. 5.)

When petitioner entered his office, Glynn recognized "Edward Lee" as "Robert E. Lee." (Pet. App. 4a; Tr. 247.) Glynn asked petitioner what his real first name was, and then had the May 10 application brought to him. A

comparison of the two applications revealed differences in name, social security number, name of wife, education, and employment history. (Pet. App. 4a; Tr. 247-49.) Because at least one of the applications had to be false, Glynn, following company policy expressed in the manual and on the application, decided, for the first time, not to hire petitioner. The falsified application was the sole reason for respondent's refusal to hire petitioner. (Pet. App. 4a; Tr. 249-50.)

## SUMMARY OF ARGUMENT

1. This case is inappropriate for Supreme Court review because it was decided by the court of appeals upon a review of the facts under the "clearly erroneous" standard of Fed. R. Civ. P. 52, not on any contested principles of law. The "employment interview" and "after-acquired information" issues petitioner seeks to raise are not properly presented on this record because the court of appeals found that petitioner was not denied an interview on May 10 and was not denied employment by respondent until June 7. Further, the court of appeals did not evade the issue of discrimination *vel non*, but squarely held that respondent did not discriminate against petitioner. Review of this case would entail no more than a second appellate review of its factual record, and "would be of no importance save to the litigants themselves." *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

2. This case is inappropriate for review by this Court for a second and equally important reason: the court of appeals has considered the entire factual record with care and reached a correct decision. The district judge's specific comments in the record demonstrate that his ruling in favor of petitioner was predicated not upon the evidence in the record, but upon his own extrajudicial view

of the general prevalence of race discrimination. In ruling for petitioner, the district judge disregarded overwhelming impeaching evidence against petitioner, which showed that petitioner perjured himself repeatedly with regard to the facts of this case, lied about his employment history, and was utterly unworthy of belief. As its opinion demonstrates, the court of appeals conducted a careful review of the record under the appropriate standard of review and correctly determined the district court's finding of discrimination to be "clearly erroneous".

## ARGUMENT

### I. THE THREE ISSUES PETITIONER SEEKS TO RAISE HERE ARE NOT PRESENTED ON THIS RECORD.

#### A. THE COURT OF APPEALS DID NOT HOLD EMPLOYMENT INTERVIEWS EXEMPT FROM THE SCOPE OF TITLE VII.

Respondent has never asserted, and the court of appeals did not hold, that Title VII is inapplicable to a discriminatory denial of an employment interview. Rather, the court of appeals held that petitioner was not discriminatorily denied an employment interview on May 10, 1977, or at any time, and that respondent justifiably denied petitioner employment on June 7.

> Lee was denied employment because Glynn discerned on June 7, 1977 that at least one of Lee's job applications had been falsified.
>
> . . .
>
> The district court finding that Title VII was violated on May 10, 1977, however, is clearly erroneous. Glynn testified that Lee's application was considered pending on that date, while Lee testified that he was not told he would not be hired until June 7.

(Pet. App. 9a.) As the court of appeals explained, "Turczak's failure to interview Lee on May 10 is not the type of conduct prohibited by Title VII" since "Turczak was unavailable because of a production meeting on the morning of May 10." (Pet. App. 9a-10a & n.9.)

Petitioner's characterization of the "pending" status of his application as "subterfuge in light of [his] testimony

at trial" (Pet. 9) reflects the real basis for his request for review in this Court: the rejection, by the court of appeals, of his version of the events of May 10, 1977. This factual issue does not merit the attention of this Court. Moreover, as is demonstrated in Section II, *infra*, the evidence in the record compels the conclusion reached by the court of appeals.

### B. THE COURT OF APPEALS DID NOT PERMIT RESPONDENT TO REBUT A CHARGE OF DISCRIMINATION WITH AFTER-ACQUIRED INFORMATION.

The "important question of first impression" petitioner seeks to have this Court review, *i.e.*, whether an employer may "rebut a charge of racial discrimination by relying upon information of which the employer had no knowledge at the time the discrimination occurred" (Pet. 11), is likewise not presented by this case. Once again, the conclusion of the court of appeals that respondent's decision not to hire petitioner was made on June 7, 1977, and not before, renders the question of "after-acquired information" irrelevant; on that date, Glynn knew that petitioner had falsified at least one of his applications. Respondent's "non-discriminatory company policy" therefore precluded petitioner's employment. (Pet. App. 9a.) It is this factual conclusion, rather than any legal issue, that petitioner asks this Court to review. This factual issue does not merit the attention of this Court. Moreover, as is demonstrated in Section II, *infra*, the evidence in the record compels the conclusion reached by the court of appeals.

### C. THE COURT OF APPEALS REVERSED THIS CASE BECAUSE THE DISTRICT COURT'S FINDING ON THE ULTIMATE QUESTION OF DISCRIMINATION VEL NON WAS CLEARLY ERRONEOUS.

Petitioner's third argument, that the opinion of the court of appeals "runs afoul of this Court's recent decision in *United States Postal Service Board of Governors* v. *Aikens*, 103 S.Ct. 1478 (1983)" (Pet. 14), is without merit. The court of appeals did not evade the ultimate question of discrimination *vel non;* rather, it addressed that issue squarely and concluded, after a review of the entire record, that no discrimination had occurred. When the court of appeals addressed the question of petitioner's qualifications, it did so only as one step in its application of the entire standard enunciated in *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Hence, the court of appeals ultimately held:

> Our review of the record in this case leaves us with the firm conviction that Lee was not a victim of employment discrimination. . . . [E]ven if Lee were qualified to perform the duties of a journeyman machinist, National Can articulated a nonpretextual, legitimate reason for its refusal to employ him; a reason which Lee failed to rebut.

(Pet. App. 10a.) Because the opinion of the court of appeals addressed and decided the ultimate question of discrimination *vel non*, it does not run afoul of *Aikens*, and review of the appellate court's conclusion concerning petitioner's qualifications would be a meaningless exercise.

## II. THE DECISION OF THE COURT OF APPEALS IS CORRECT.

The court of appeals recognized that only in the unusual case may it reverse a district court's findings of fact. "Ordinarily, an appellate court will not set aside a trial court's findings, particularly where those findings are based primarily upon the credibility of the witnesses." (Pet. App. 6a.) In conducting its review, the court of appeals carefully applied the clearly erroneous standard in accordance with this Court's instruction: "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Pet. App. 6a quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948).) Because the district court chose to ignore the compelling evidence of impeachment that discredited petitioner's uncorroborated testimony in favor of its extrajudicial view of the prevalence of race discrimination, the court of appeals held its finding clearly erroneous.

Petitioner has an undeniable and well-established history of lying under oath. Indeed, his lies from the witness stand in another of his Title VII cases, *Lee v. International Harvester Co.*, 78 C 4609 (N.D. Ill.), prompted the experienced Senior District Judge presiding over that case, Bernard M. Decker, to make the following findings concerning petitioner:

> I find him, certainly, a less than credible witness; in fact, I have had, in my whole experience, I don't think that I have ever had as glaring an example of a witness on the witness stand who makes a statement one minute and disputes it, who himself disputes it in the next. There is utter lack of credibility in this case. . . .

> I am going to refer this case to the United States District Attorney for whatever action he deems appropriate. Anyone who uses two Social Security numbers in the manner in which this plaintiff has done deserves to be taken out of circulation.

(78 C 4609, Tr. 177-79.)

Petitioner's flagrant disregard for the oath manifested itself frequently in this case. His EEOC charge contained material falsehoods. Petitioner did not return to respondent's plant on May 11 and wait an additional two hours for an interview as he stated under oath to the EEOC twice, the first time being May 11, the very day he claimed to have returned. When confronted with this lie at trial, petitioner's explanation was characteristically incredible: "I was aware that I didn't return, though it wasn't on my mind at the time." (Tr. 129.) Similarly, his claim that he saw the machine shop foreman interviewing white applicants was belied at trial by the fact that his description of Turczak was completely wrong. (Pet. App. 3a n.2; Tr. 124-26, 259.)

At trial, petitioner falsely denied keeping two social security numbers under different names. (Tr. 94.) Petitioner's counsel later admitted that petitioner had been in possession of the two numbers since the 1940's, had not informed the Social Security Administration, and had used both from time to time. (Tr. 346.) Petitioner also lied at trial by testifying that everything on his June 7 employment application (D.Ex. 5) was true except for the social security number. (Tr. 66.) That application contained gross misstatements concerning: his employment history

(Tr. 130-43), his marital status (Tr. 153), his education (Tr. 49), and his military history.[4]

Petitioner also made contradictory sworn statements about his employment history. In his verified amended complaint (R. 49, ¶ 8, D.Ex. 35B), petitioner stated that he had worked for Crane Company from 1972-1978, and even specified brief layoffs in 1975, 1976, and 1977. In his affidavit in opposition to respondent's summary judgment motion, petitioner stated that in his May 10 application he "made a mistake and wrote Piasecki instead of Crane Co., for '72-'76." (R. 64; D.Ex. 35B.)[5] Yet in an affidavit he submitted in still another of his Title VII cases, *Lee* v. *Continental Can Co.*, 78 C 3252 (N.D. Ill.), petitioner stated that he worked for Crane for one year, around 1975. (D.Ex. 18, ¶ 11.) Finally, at his deposition in this case, Lee admitted that he only worked at Crane for about 5 months. (Lee Dep. 92, D.Ex. 35B.)

Two final examples of petitioner's mendacity are his federal income tax returns of 1977 and 1978. Although he had been divorced since 1953, petitioner filed these in-

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[4] Petitioner's military history became an issue at trial only because petitioner had altered the copy of his May 10 application that he sought to have admitted into evidence. At the time petitioner submitted the application to respondent, it stated that he had no military service; by the time of trial it had been changed to state that petitioner had served in the army. When questioned, petitioner could not explain why he had denied serving in the military on his application or why he had altered the copy of his May 10 application. (Tr. 79-91.)

[5] The different time period for petitioner's employment at Crane is only one of the many lies in this affidavit. His claim to have made a "mistake" also is a lie, as is evidenced by the fact that Piasecki, where he actually worked briefly in 1954, is in Philadelphia, while Crane is in Chicago.

come tax returns as joint returns with a fictitious wife whose name, Lois Lee, is different from either of the "wives" he listed on his two job applications. Lee signed his returns under the following declaration: "Under penalties of perjury, I declare that I have examined this return . . . and to the best of my knowledge and belief, it is true, correct, and complete." (Pet. App. 4a n.4; D.Ex. 35C.)

Despite all of this evidence to the contrary, the district court concluded: "Mr. Lee doesn't impress me as a liar or a fraud." (Pet. App. 19a.) The court's stated reason for crediting Lee's testimony was its own view of the prevalence of race discrimination:

> Mr. Lee didn't testify about anything that was bizarre, unbelievable in itself, unusual or that doesn't happen. The experience that Mr. Lee described has happened to thousands and thousands of persons like him in the City of Chicago in my lifetime and in the past and regrettably, it perhaps will happen to others like him.

(Pet. App. 19a.)

The district court's clearest expression of this view occurred during respondent's closing argument:

> I happen to know that in the skilled and semi-skilled industries and crafts, in the greater metropolitan area, it's common knowledge and documented by reports of the State Department of Labor, reports of the United States Civil Rights Commission, reports of the EEOC that in the greater metropolitan area of Chicago, there is rampant racism among the skilled and semi-skilled crafts, like machinists, plumbers, electricians. It's common knowledge. It's so common that I could take judicial notice of it because if we have to, I can get the reports of the United States Govern-

> ment on this subject concerning Chicago, and its environment. . . .

(Tr. 334.)

This view permeated not only the district court's finding concerning petitioner's credibility, but all of its findings. Although the district court acknowledged that petitioner's history of numerous firings and short term jobs "would raise reasonable questions about his competency" (Tr. 334), he found petitioner qualified. The district court reasoned that petitioner's inability to hold a job "doesn't mean that Mr. Lee is not a qualified machinist, because this Court happens to know that many people are discharged wrongfully, they are discharged for race discriminatory reasons and others. We don't have the time, nor should we look into the reason why Mr. Lee was terminated all these various times." (Pet. App. 23a.) Similarly, in response to respondent's unchallenged evidence of the existence and nondiscriminatory application of its policies of verifying employment histories and not hiring persons who falsify applications, the district court stated: "That's all right to use that standard when they want to, but if we had some time, Mr. Levenstam [respondent's counsel], we would subpoena all the employment records and study them, and I am quite sure you would find out they don't follow that policy." (Tr. 338.)

The court of appeals recognized that "the district court went beyond the record in this case. . . ." (Pet. App. 8a.) Setting aside the district court's extrajudicial view of the prevalence of discrimination, which is not a finding of fact entitled to deference under Fed. R. Civ. P. 52, the court of appeals conducted an exhaustive review of the record. The court of appeals evaluated petitioner's testimony in light of the overwhelming and incontrovertible evidence of impeachment and rejected as clearly erroneous

the district court's finding that petitioner was credible. (Pet. App. 3a-4a & nn.2, 3, 4.) The appellate court found that "[d]espite the district court's intimations to the contrary, nothing in the record suggests that National Can applied [its hiring] policy discriminatorily," and that respondent had articulated a legitimate, nondiscriminatory reason for denying petitioner employment. (Pet. App. 8a-9a & n.8.) Finally, the court of appeals held that "Lee did not introduce any rebuttal evidence, nor was the evidence introduced by Lee's case-in-chief sufficient to establish pretext." (Pet. App. 9a.) Thus the court of appeals correctly concluded: "Our review of the record in this case leaves us with the firm conviction that Lee was not a victim of employment discrimination. . . . The findings of the district court to the contrary are clearly erroneous and must be set aside." (Pet. App. 10a.)

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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